02-291 (2)

~~No. 02-291~~

Supreme Court, U.S.
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In The

Supreme Court of the United States

SUMMIT FINANCIAL HOLDINGS, LTD.,

Petitioner,

v.

CONTINENTAL LAWYERS TITLE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the state court's decision, which cannot be reconciled with state statutes creating a duty of due care, violates due process where it impermissibly shifts. the burden of proof and is not supported by substantial evidence.

2. Whether a title company, with actual notice of a recorded assignment of deed of trust, owe a duty of due care to the beneficiary of record, when the title company mistakenly pays the wrong party and subsequently reconveys the beneficiaries' recorded deed of trust.

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JURISDICTION

As discussed in Part I of Reasons for Denying the Petition, Petitioner failed to raise its current federal claim in the California Supreme Court and that court did not address the issue. This Court has held that it will not consider a petitioner's federal claim unless it was presented to or addressed by the state court whose decision is being presented for review. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 85 (1997); *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992).

STATEMENT OF THE CASE

In August 1994, John A. Furnish ("Furnish") was the owner of residential property in Costa Mesa, California (the "Property"). Furnish obtained a personal loan in the amount of $425,000.00 from Talbert Financial, Inc. ("Talbert"), evidenced by a promissory note (the "Note") and secured by a second deed of trust recorded against the Property (the "Deed of Trust"). Concurrently with the recordation of the Deed of Trust, an assignment of the Note and Deed of Trust in favor of Petitioner was also recorded ("Assignment").

The Note expressly provided that, absent written notice to the contrary, all payments were to be made directly to Talbert. After the loan was made, Talbert sent Furnish a payment book listing Talbert's address for payment. Neither Talbert nor Petitioner provided Furnish notice of the assignment as required by California Civil Code § 2937. Nor did Talbert or Petitioner provide the notice required by the Note to pay anyone else other than Talbert.

In September 1995, Furnish refinanced the Property and paid off the loan. In the refinance transaction, Beverly Hills Escrow acted as the escrow holder. Lawyers Title Insurance Corporation, through its agent, Respondent, issued a title insurance policy to the new lender, Dundrel Securities, Inc. Respondent also acted as the sub-escrow holder in the transaction. Neither Talbert nor Petitioner were parties to the escrow.

The preliminary report reflected the Assignment. However, no party to the escrow ever instructed Beverly Hills Escrow or Respondent to send the payoff of the loan to Petitioner instead of to Talbert. Talbert was the only party to submit a beneficiary demand for payment to Beverly Hills Escrow. Beverly Hills Escrow instructed Respondent to pay Talbert's demand, which Respondent did. Talbert did not remit the funds to Petitioner.

Petitioner sued Respondent in the state court alleging negligence on the part of Respondent. Specifically, Petitioner asserted that since Respondent was aware of the Assignment from Talbert to Petitioner, Respondent was negligent in paying Talbert as opposed to Petitioner.

While that action was pending, Furnish filed for bankruptcy protection. The Bankruptcy Court entered an order to permit Furnish to sell the Property free of all liens. Petitioner filed a claim to the net proceeds. On October 2, 1997, the Bankruptcy Court entered its order disallowing Petitioner's claim because notice of assignment of the Note was not given to Furnish as required by California law and payment to Talbert extinguished the Note. Petitioner's motion for reconsideration was denied. Petitioner never appealed the order.

Thereafter, the state court matter was tried as a bench trial. The trial court concluded that Respondent owed a duty of care to Petitioner and was negligent in paying Talbert instead of Petitioner. However, the trial court attributed fifty percent fault to Petitioner and awarded Petitioner fifty percent of its alleged damages. Judgment was entered in favor of Petitioner in the amount of $258,830.27.

Respondent appealed the trial court's judgment to the California Court of Appeal, arguing in part that Petitioner was a stranger to the escrow and, therefore, Respondent did not owe Petitioner a duty of care. The Court of Appeal reversed the trial court's judgment, holding that Petitioner did not owe a duty of care to Respondent under *Biakanja v. Irving*, 49 Cal.2d 647, 650 (1958).

Petitioner petitioned the California Supreme Court for review, which was granted. Petitioner framed the issue as follows:

> Does a title company, with actual notice of a recorded Assignment of Deed of Trust, owe a duty of due care to the record owner of the trust deed when, acting as an escrow holder, it pays the wrong party during the payoff of the underlying promissory note.

[Petition for Review to the California Supreme Court, appended hereto at App. 1.]

The California Supreme Court held that Respondent did not owe a duty of due care to Petitioner in that Petitioner was not a party to the escrow and Respondent had never been instructed by a party to the escrow to pay Petitioner.

REASONS FOR DENYING THE PETITION

Petitioner contends that under California Civil Code § 1714(a), Respondent is responsible for all injury caused by its negligent conduct and that the California Supreme Court has no authority to determine a person's duty of due care. Under California law, a six-factor test is applied to determine a party's duty of care to a third party like Petitioner. *Biakanja v. Irving,* 49 Cal.2d 647, 650 (1958). In its opinion in the case at bar, the California Supreme Court, relying on long established precedent, held that "the threshold question in an action for negligence is whether the defendant owed the plaintiff a duty to use care." Petitioner argues that the California Supreme Court misinterpreted California Civil Code § 1714(a), should not have considered the threshold issue of duty to use care and should not have applied the six-factor test to conclude that Respondent owed no duty of care to Petitioner. Petitioner now argues that its due process rights were violated by the California Supreme Court's interpretation of California law.

For the following reasons, this claim is not properly presented in this case and in any event, is entirely without merit:

1. Petitioner failed to raise any federal issue in the California Supreme Court. The California Supreme Court, in turn, never discussed any federal constitutional issue. Because the California Supreme Court did not have a fair opportunity to address the federal question that is sought to be presented here, this Court should not consider Petitioner's federal claim.

2. There is no federal question presented. The California Supreme Court decision is premised

solely on its interpretation of California law. Where parties have been fully heard, even an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law.

3. The California Supreme Court decision is not erroneous. Under long-standing judicial principles, that court has the right to determine whether a duty of care exists in a particular case.

I

THE QUESTION PRESENTED IS NOT PROPERLY BEFORE THE COURT BECAUSE IT WAS NEITHER PRESENTED NOR ADDRESSED IN THE CALIFORNIA SUPREME COURT

The constitutional issue presented by Petitioner is not properly before the Court. With "very rare exceptions," this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that a federal claim will not be considered unless it was either addressed by, or properly presented to, the state court that rendered the decision that is the subject of review. *Adams v. Robertson,* 520 U.S. 83, 86 (1997); *Yee v. Escondido,* 503 U.S. 519, 533 (1992). As is evidenced from the California Supreme Court's decision appended to the Petition for Writ of Certiorari, the California Supreme Court did not address any federal issues. As stated in *Adams,* "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Id.* 520 U.S. at 86. Petitioner bears the burden of defeating this assumption.

Rule 14(g)(i) of the U.S. Supreme Court rules requires Petitioner to identify in the Petition when and how the

federal questions sought to be reviewed were raised and the state court's disposition of the federal question "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Petitioner has failed to make that showing.

Nor were any federal issues presented to the California Supreme Court. Petitioner presented the following issue to the California Supreme Court: "Does a title company, with actual notice of a recorded Assignment of Deed of Trust, owe a duty of due care to the record owner of the trust deed when, acting as an escrow holder, it pays the wrong party during the payoff of the underlying promissory note." [Petition for Review to the California Supreme Court, appended hereto at 1-A.] Petitioner's basis for review before the California Supreme Court was the presence of a conflict between the Second and Fourth Appellate Districts regarding the existence of a duty of due care by an escrow holder to third parties, the analysis of which was solely premised on state law.

This Court stated in *Webb v. Webb,* 451 U.S. 493, 499 (1981):

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

This Court further stated in *Webb*, that this principle of comity requires "a proper respect for state functions, . . . and a continuance of the belief that the National Government

will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* 451 U.S. at 500, citing *Younger v. Harris,* 401 U.S. 37, 44 (1971).

Since Petitioner failed to raise its federal claim in the state proceedings and the California Supreme Court failed to rule on a federal issue, this Court is without jurisdiction in this case. Even if the rule is prudential rather than jurisdictional, prudence dictates that the Petition should be denied.

II

THE CALIFORNIA STATE COURT DECISION DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BECAUSE PETITIONER HAD NOTICE AND AN OPPORTUNITY TO BE HEARD

Petitioner contends that the California Supreme Court's interpretation of a California statute violates the Due Process Clause of the Fifth Amendment. It is well established that "when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law. . . ." *Bonner v. Gorman,* 213 U.S. 86, 90 (1909). The Tenth Circuit Court of Appeal elaborated on this principle in *State of Kansas v. Occidental Life Ins. Co.,* 95 F.2d 935 (10th Cir. 1938), *cert. denied,* 305 U.S. 603 (1938):

> The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the

> order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense. An order, judgment, or decree entered in such circumstances does not violate the due process clause even though it be erroneous in fact or law, or both.

Id. 95 F.2d at 937.

It has been a long standing principle of this Court that it will not review judgments of state courts that rest on state grounds. The policy underlying this principle was succinctly stated in *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945):

> The reason is so obvious that it has rarely upon thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

Petitioner assails the California Supreme Court decision because it contends that the California Supreme Court did not properly interpret a state statute. Significantly, Petitioner does not contend that it was deprived of notice and the opportunity to be heard or that the judicial process was somehow infected with procedural irregularities. Petitioner's sole complaint rests on its dissatisfaction with the California Supreme Court's application of California law. Under these circumstances, no constitutional issue is presented.

III

THE CALIFORNIA SUPREME COURT DECISION IS NOT ERRONEOUS BECAUSE IT FOLLOWED LONG ESTABLISHED JUDICIAL PRINCIPLES IN REACHING ITS DECISION

California Civil Code § 1714(a) provides:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

Petitioner contends that under California Civil Code § 1714(a), Respondent is responsible for all injury caused by its negligent conduct regardless of whether or not Respondent owed a duty of care to Petitioner under the circumstances.

Petitioner argues that the California Supreme Court misinterpreted California Civil Code § 1714(a) and should not have applied the six-factor test to conclude that Respondent owed no duty of care to Petitioner. Petitioner's argument is not supported by long established principles of negligence. Similar arguments that Section 1714(a) establishes a duty that cannot be judicially interpreted have failed. *See, e.g., Kentucky Fried Chicken of California, Inc. v. Superior Court,* 14 Cal.4th 814, 828 (1997).

The California Supreme Court, in *Li v. Yellow Cab Co. of California,* 13 Cal.3d 804, 814 (1975), stated the intent of the Legislature in enacting Section 1714 in 1872:

> [I]t was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the

> common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Even before the enactment of the California Civil Code in 1872, the California Supreme Court characterized negligence as "the failure to exercise that degree of care which may reasonably be expected from a person in the given individual's situation." *Gay v. Winter,* 34 Cal. 153 (1867). In fact, the Legislature, in enacting the California Civil Code in 1872 (which included section 1714), expressly provided that its provisions are to be liberally construed with a view to "effect its objects and promote justice." California Civil Code § 4. The Legislature also intended that the Civil Code, insofar as its provisions are substantially the same as existing common or statutory law, must be construed as continuations thereof and not as new enactments. California Civil Code § 5.

The California Supreme Court recognizes that under Section 1714 each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances. *Parsons v. Crown Disposal Co.,* 15 Cal.4th 456, 472 (1997). However, the Court stated "[w]hether a given case falls within an exception to this general rule, or whether a duty of care exists in a given circumstance, is a question of law to be determined on a case-by-case basis. [citations omitted.]" The Court further noted that duty "is not an immutable fact of nature but only an expression of the sum total of those *considerations of policy* which lead the law to say

that the particular plaintiff is entitled to protection. [citations omitted, emphasis in original.]" *Id.* 15 Cal.4th at 472.

With respect to duties to strangers, the California Supreme Court has stated that "[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." *Quelimane Company, Inc. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 57 (1998). Under California law, a six-factor test is applied to determine a party's duty of care to a third party like Petitioner. *Biakanja v. Irving,* 49 Cal.2d 647, 650 (1958). The California Supreme Court applied the six-factor test and determined that Respondent did not owe a duty of care to Petitioner.

In short, the California Supreme Court properly analyzed whether or not Respondent owed a duty of care to Petitioner under the circumstances.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUMMIT FINANCIAL HOLDINGS, LTD. Plaintiff and Respondent, VS. CONTINENTAL LAWYERS TITLE, Defendant and Appellant.	No. _____

Fourth Appellate District No. G023428
Orange County Superior Court No. 767157
The Honorable Raymond J. Ikola, Judge

PETITION FOR REVIEW

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ISSUE PRESENTED

Does a title company, with actual notice of a recorded Assignment of Deed of Trust, owe a duty of due care to the record owner of the trust deed when, acting as an escrow holder, it pays the wrong party during the payoff of the underlying promissory note.

ARGUMENT

Appellant's LIABILITY FOR NEGLIGENCE SHOULD BE AFFIRMED SINCE THE TRIAL COURT PROPERLY FOUND APPELLANT OWED A DUTY OF DUE CARE TO THE RECORDED OWNER OF THE TRUST DEED IN ACCORDANCE WITH *KIRBY V. PALOS VERDE ESCROW COMPANY, INC.*[2]

Appellant was found liable for negligence by the trial court for paying off the wrong party despite actual knowledge

[2] A complete factual and procedural background is set forth in the Court of Appeals decision, which is attached as Appendix A.

of the recorded assignment of the promissory note and deed of trust in favor of Respondent – the exact encumbrance the payoff was intended to clear. Appellant was also held liable for its violation of Civil Code §2941 for improperly reconveying, and thereby destroying, Respondent's Trust Deed/security interest.

The Fourth Appellate District reversed the trial court, finding that, despite Appellant's actual knowledge of Respondent's interest in the subject property (including the admitted purpose of the entire payoff transaction) and Appellant's subsequent destruction of Respondent's interest, Appellant owed no duty of due care to Respondent.

In determining whether Appellant owed a duty of due care the trial court looked to the case of *Kirby v. Palos Verdes Escrow Co.*, (1986) 183 CA3d 57 for guidance.[3]

The *Kirby* court found the escrow agent liable when it had notice of an assignment and paid the assignor instead of the recorded beneficiary, just like the case at bar. The factual similarity to the instant case is significant and compelling.

The *Kirby* court, as cited by the Fourth Appellate District, discussed (quoting from *Kirby*) the exact dilemma at issue herein:

> "Receipt of notice of the assignment was equivalent to receipt of new escrow instructions regarding the party to be paid. [citation omitted] Such

[3] The trial court also noted a lack of published appellate opinions for guidance, noting that *Kirby* was the only case on point. The court of Appeals also noted *Kirby* was the central authority at issue in this case.

> "new" instructions conflicted with the Pierces verbal instructions to pay Universal. This conflict should have alerted defendant to a potential problem in paying Universal rather than the [Plaintiffs]' and *vice versa*. **As an escrow holder faced with conflicting instructions, [defendant] had the duty to delay payment of escrow funds until such time as the proper payee was identified."**

Summit, at 10, Appendix A (emphasis added)

The *Kirby* court instructed that the escrow holder should resolve the inconsistencies before acting, or it acts at its peril. This is a prudent approach approved by the trial court but soundly rejected by the Fourth Appellate District.

Respondent maintains that the Fourth Appellate District incorrectly reversed the trial courts judgment in the instant case by rejecting the reasoning of *Kirby* and ignoring the effects of the recording statutes.

The Fourth Appellate District in this matter went to great lengths to distinguish *Kirby* by sidestepping the principals of negligence relied upon by both the trial and *Kirby* courts, and looking to the law of agency as its basis for reversal.

The Fourth Appellate District ruled that Appellant was the agent of Furnish (the debtor on the promissory note and deed of trust) and that since Appellant followed the instructions given it, there could be no liability, especially to a non-party to the escrow.

The problem with the Fourth Appellate Districts reasoning on this point is that it ignores the **admitted**

knowledge of Appellant. Had Appellant merely followed orders without any knowledge of Respondent's interest the Fourth Appellate District *might* have been correct. However, from knowledge comes foreseeability of harm. In recognizing the importance of the foreseeability of harm in creating a duty of due care this court has held:

> **Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case.** *Dillon v. Legg*, (1968) 68 Cal. 2d 728 at 740; [emphasis added]

Since Appellant had actual notice of Respondent's recorded interest, it was certainly foreseeable that if due care was not used (as indeed it was not) damage would be suffered by Respondent (as both trial and appellate courts found to have been the case).

The law of negligence is clear on the issue of assumption of duty: when one undertakes to act, he must do so with due care. C.C. §1714(a); *Rowland v. Christian*, (1968) 69 C2d 108; 112. Simply stated: Appellant knew Respondent was the holder/beneficiary of record and had a right to receive the payoff funds. Appellant, (acting as escrow agent) had those very funds, and when Appellant acted to disburse those funds it had a duty to use due care so as not to damage Respondent's right to receive its payment. Appellant could have used the Kirby approach and resolved the discrepancy, but it chose haste over prudence[4],

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[4] Even Appellants own expert testified that Appellant should have initiated *some* communication to Respondent, the beneficiary of record,

(Continued on following page)

a decision which proximately caused damage to Respondent.

Another problem with the Fourth Appellate Districts opinion in *Summit* is that the court ruled that mere foreseeability of harm is not enough, by itself, to create a duty of due care. The court then went on to opine that since the Furnish/Dundrel transaction did not involve Respondent, there was less of a reason to find the existence of a legal duty of care. Unfortunately, the Court of Appeals misunderstood the transaction at issue: **The whole point of the Furnish/Dundrel loan was to payoff Respondent's encumbrance!** Thus, Respondent was a third party beneficiary to the Furnish/Dundrel agreement. By omitting this key fact the Fourth Appellate District misapplied this courts ruling in *Biakanja v. Irving (1958) 49 Cal.2d 647, 320 P.2d 16.*

In *Biakanja* this court stated (at pg. 650):

> "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of several factors . . . " [emphasis added].

Since, as demonstrated above, Respondent was directly involved in the Furnish/Dundrel transaction as a third party beneficiary the Fourth Appellate District misapplied the factors enumerated in *Biakanja*.

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before paying off a third party with no record interest. Unfortunately Appellant did not.

Since *Biankja*, this court has provided further guidance on the issue of determining whether to impose a duty of due care:

> "Rather than traditional notions of duty, **this court has focused on foreseeability as the key component necessary to establish liability**: "While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. . . . **[Foreseeability] of the risk of a primary consideration in establishing the element of duty."** (*Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46 [emphasis added]

The misapplication of *Biakanja* by the Fourth Appellate District is critical since it is the basis for finding no duty of due care. In *Summit* the Fourth Appellate District held:

> "We hold that CLTC did not owe a duty of care to Summit under *Biakanja v. Irving, Supra, 49 Cal.2d 647*. We also conclude Kirby was incorrectly decided and should not be followed" *Summit* at pg. 23

This small paragraph from the *Summit* opinion clearly demonstrates the need for Supreme Court Review: 1) a clear conflict of published opinions and 2) a mistake in law by the court of appeals.

THIS CASE RAISES SIGNIFICANT PUBLIC POLICY ISSUES

Civil Code section 1714(a) provides that every person is responsible, not only for the results of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his property or person. By its terms, this section imposes the obligation to exercise ordinary care and skill to avoid injury to others. This court has approved and relied upon the legislatures express statement of public policy in C.C. §1714(a) stating:

> In addition, this holding is consistent with the Legislature's declaration of the basic principle of tort liability, embodied in Civil Code section 1714, that every person is responsible for injuries caused by his or her lack of ordinary care. (See *Rowland v. Christian, supra*, 69 Cal.2d at p. 119.) That section does not distinguish among injuries to one's person, one's property or one's financial interests. Damages for loss of profits or earnings are recoverable where they result from an injury to one's person or property caused by another's negligence. Recovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs. *J'Aire Corporation, v. Gregory*, (1979) 24 Cal. 3d 799; 157 Cal. Rptr. 407

As this court has acknowledged, §1714(a) codifies a basic tenant [sic] of an ordered society and the public policy of California. This statute was the basis for the *Kirby* court's decision as well as the trial courts decision.

In this case Appellant knew of Respondent's interest and despite this knowledge, went ahead and paid the

wrong party and destroyed Respondent's security interest. It is submitted that Appellant acted in a manner substantially likely to create harm: exactly the type of immoral malfeasance the law of negligence was intended to remedy.

The Court of Appeals sanctioned this conduct, allowing contractual machinations to replace objective reasonableness as the standard to judge a miscreant's actions. This case could be used as a basis for a new trend in fraud, leaving the public and victims without remedy against those that fail to act as a reasonable and prudent person, but who follow their principal's instructions (except in the Second Appellate District which would, under *Kirby*, hold these persons liable).

The Fourth Appellate District's opinion not only lessens the basic duty to act reasonably, not a good thing in an ordered society, but at the same time renders the recording act and statutes meaningless. If a title company with actual knowledge of a beneficiary *with a recorded interest* in real property can pay the wrong party, *with no interest*, with impunity (per the ruling in *Summit*), then how can courts impose liability on anyone.

The floodgates of fraud have opened, this court must close them.

Respondent submits that the present conflict between the Second and Fourth Appellate Districts regarding the existence of a duty of due care by an escrow holder to known third parties is necessary to provide guidance to trial courts, attorneys, escrow holders and property owners.

Review and reversal are also necessary in order to maintain the viability of the recording statutes, for if actual notice of a recorded interest is not sufficient to protect a property holder, what is?

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this court grant review.

Dated: May 1, 2001

Respectfully Submitted,

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APPENDIX "A"

CERTIFIED FOR PUBLICATION

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUMMIT FINANCIAL HOLDINGS, LTD., Plaintiff and Respondent, v. CONTINENTAL LAWYERS TITLE COMPANY, Defendant and Appellant.	D036868 (Super. Ct. No. 767157) (Filed Mar. 27, 2001)

APPEAL from a judgment of the Superior Court of Orange County, Raymond J. Ikola, Judge. Reversed.

Wolf, Rifkin & Shapiro and Marc Eliot Rohatiner for Defendant and Appellant.

Doumani & Grandon, Robert M. Grandon; Callahan & Blaine and Jim P. Mahacek for Plaintiff and Respondent.

In 1994 Dr. Furnish, the maker of a promissory note secured by a deed of trust on real property in Corona Del Mar (referred to as the note, the deed of rust and the property, respectively), refinanced his secured obligations by obtaining a new loan from a new lender, a portion of the proceeds of which was to pay the note in full. Appellant Continental Lawyers Title Company (CLTC) provided escrow services for the refinance

transaction and was instructed by the parties to the escrow to pay the note by issuing a check to Talbert Financial (Talbert). CLTC followed that instruction on closing of the refinance transaction.

In this lawsuit, respondent Summit Financial Holdings, Ltd. (Summit) sued CLTC for negligence. Summit alleged that in the refinance transaction CLTC should have paid the note by issuing a check to Summit rather than Talbert because CLTC knew Talbert had assigned its rights in the note and deed of trust to Summit. The trail court, relying on *Kirby v. Palos Verdes Escrow Company, Inc.* (1986) 183 Cal.App.3d 57 (*Kirby*), concluded CLTC as escrow holder owed a duty of care to third parties, including Summit, who were not parties to the escrow; and breached that duty because CLTC, with knowledge of the assignment from Talbert to Summit, paid Talbert rather than Summit. The trial court awarded judgment to Summit against CLTC for negligence, and this appeal by CLTC followed.

Although CLTC raises numerous claims on appeal, the dispositive issue is whether *Kirby* correctly held that a stranger to the escrow is owed a duty of care by an escrow holder. We conclude an escrow holder owes a duty of care only to the parties to and participants in the escrow, and *Kirby* incorrectly held an escrow holder liable to a stranger to the escrow under a negligence theory. Because CLTC owed no duty of care to Summit, we reverse the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. The Loan

In August 1994 Furnish borrowed $425,000 from Talbert, and signed the note payable to Talbert. The note was secured by the deed of trust on the property. Both the note and the payment book given to Furnish required him to pay the monthly installments on the note to Talbert at Talbert's Orange, California address.[1]

At the same time that the deed of trust was recorded, a document entitled "Assignment of Deed of Trust" was recorded that assigned the beneficial interest under the note and deed of trust from Talbert to Summit. However, neither Talbert nor Summit gave Furnish notice of the assignment, as required by Civil Code 2937.[2]

B. The Refinance

In September 1995 Furnish obtained a new loan from Dundrel Securities (Dundrel) that was used in part to pay the note. Furnish and Dundrel employed Beverly Hills Escrow (BHE) to handle the refinancing transaction, and CLTC acted as an escrow holder in connection with issuing the title insurance for the new deed of trust securing the

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[1] Under the terms of the note, the first six monthly installments were impounded. Furnish paid three other monthly installments to Talbert in June, July and August 1995. Other than the impounded amounts and these three payments, Furnish made no payments on the note.

[2] All statutory references are to the Civil Code unless otherwise specified.

new note payable to Dundrel. Summit was not a party to the BHE escrow or the CLTC escrow.

CLTC prepared a preliminary title report noting (at item 6) that the property was encumbered by a deed of trust securing the Talbert note, and that an assignment of the note and deed of trust from Talbert to Summit had been recorded. BHE thereafter obtained a note payoff demand from Talbert specifying the outstanding balance to be paid to Talbert to fully pay the note. On September 8, 1995, BHE forwarded Talbert's payoff demand to CLTC and identified it as the "Demand for item 6 on the Preliminary Title Report."

On close of the refinancing transaction, CLTC paid Talbert from funds deposited with CLTC by Dundrel in accordance with the payoff demand and BHE's instructions. Summit did not receive these funds from Talbert.

C. The Legal Proceedings

In February 1997 Furnish filed for protection under Chapter 11 of the United States Bankruptcy Code, and in April 1997 the bankruptcy court entered an order for sale of the property free and clear of all liens. The order directed that the proceeds of the sale be used to pay the amounts owed the first trust deed holder Dundrel and amounts owed to another secured creditor, and that any purported liens on the property held by other parties, including Summit, would attach to the remaining proceeds of the sale.

In July 1997 Furnish moved in the bankruptcy court for an order disallowing Summit's lien claim on the remaining proceeds from the sale of the property. Furnish

argued the amount he paid Talbert in 1995 in the refinance transaction fully extinguished Furnish's obligations under the note. He established that he never received notice of the assignment of the deed of trust as required by section 2937, subdivision (d), and under section 2937, subdivision (f), a debtor's payment to the prior note holder before receiving notice of the assignment pro tanto extinguishes the underlying obligation. The payment to Talbert therefore fully extinguished the note. Summit opposed the motion, arguing that (1) the recorded assignment of the note and deed of trust was adequate to provide constructive notice of the transfer from Talbert to Summit, and (2) in any event Furnish received a notice that complied with section 2937, subdivision (d). The bankruptcy court concluded Furnish was not given the notice required by section 2937, subdivision (d). And the payment to Talbert extinguished the note under section 2937, subdivision (f). It therefore disallowed Summit's lien claim on the remaining proceeds for the sale of the property.

In this proceeding, Summit sought recovery from CLTC of the note payment CLTC made to Talbert, contending that CLTC was negligent by making the note payment to Talbert rather than to Summit. The trial court concluded *Kirby* was controlling and that CLTC owed a duty of care to Summit. The trial court further found that CLTC was negligent, breached its duty of care to Summit, and CLTC's negligence was a proximate cause of Summit's

injury. Accordingly, the trial court entered judgment for damages in favor of Summit against CLTC.[3]

II

ANALYSIS

A. Standard of Review

Summit argues that whether CLTC owed a duty of care to Summit involves the resolution of disputed facts, and we must therefore defer to the trial court's ruling if it is supported by substantial evidence. However, Summit cites no authority supporting that argument, and the courts have concluded that whether a duty of care exists is a question of law for the court; our review of the trial court's ruling is therefore de novo. (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1450-1451; *Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406-1407.)

B. *Kirby* Erred by Imposing on Escrow Holders a Duty of Care to Strangers to the Escrow

An escrow holder is the dual agent of, and owes duties to, the parties to the escrow. The primary duty owed by an escrow holder is to strictly and faithfully perform the instructions given to it by the parties to the escrow. (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 674.) An escrow holder owes ancillary duties to the parties to the escrow, including a duty "to communicate to his principal knowledge acquired in the course of his

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[3] The trial court reduced the damage award sought by Summit because it concluded Summit was contributorily negligent.

agency with respect to material facts [that] might affect the principal's decision as to a pending transaction, particularly where, as here, he knows that the principal is looking to him for protection as to those very facts of which he has knowledge." (*Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536, 547.) If the escrow holder breaches this obligation of disclosure, or does not exercise reasonable skill and diligence in carrying out the escrow instructions, the escrow holder can be liable to its principal for any resulting injury.(*Colonial Savings & L. Assn. v. Redwood Empire Title Co.* (1965) 236 Cal.App.2d 186, 190-191.) However, an escrow holder ordinarily incurs no liability for failing to do something not required by the escrow instructions or for a loss caused by following the escrow instructions. (*Axley v. Transamerica Title Ins. Co.* (1978) 88 Cal.App.3d 1, 9; accord, *Romo v. Stewart Title of California* (1995) 34 Cal.App.4th 1609, 1618 Fn. 9 [obligation of escrow holder limited to faithful compliance with instructions from the principal[.)

Kirby appears to be the only case that holds an escrow holder can be liable to strangers to the escrow for injuries allegedly caused by the escrow holder following its principals' instructions.[4] We conclude that the case law on which *Kirby* relied for its legal analysis does not support the conclusion it reached, and we disagree with *Kirby's* holding that an escrow holder who follows its principals'

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[4] *Kirby* appears to be the first California case to permit a stranger to the escrow to recover against the escrow holder for negligence, and this aspect of *Kirby* has not been followed by any reported California case.

instructions can be liable to strangers to the escrow under a negligence theory.[5]

In *Kirby*, the plaintiffs loaned funds to Universal and received an unsecured promissory note from Universal. Universal loaned funds to the Pierces and received a not secured by a deed of trust; Universal assigned the Pierces' note and deed of trust to plaintiffs as security for Universal's note to plaintiffs and the assignment was recorded. The Pierces opened an escrow with defendant escrow holder to refinance the note they had given to Universal. Universal submitted a pay-off demand to the escrow holder and the Pierces authorized the escrow holder to pay Universal's demand. The escrow holder paid Universal although it was aware Universal had assigned the Pierces' note to the plaintiffs. Plaintiffs later sued the escrow holder, alleging that because it was aware of the recorded assignment of the Pierces' note from Universal to plaintiffs it performed its escrow duties negligently by paying

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[5] The cases in which escrow holders have been held liable to third parties did not involve third parties who were strangers to the escrow. For example, in *Warington Lbr. Co. v. Fullerton Mtge. & Escrow Co.* (1963) 222 Cal.App.2d 706, the escrow holder entered into an agreement with the third party to pay funds to the third party upon receiving the money, and the escrow holder's liability rested on the court's conclusion that the escrow holder "was no longer merely a disbursing agent but was a principal under the agreement." (*Id.* at p. 710.) Similarly, in *Feinberg v. Intrastate Escrow Corp.* (1963) 216 Cal.App.2d 80, the plaintiff-creditor agreed to withhold levying on property in return for the agreement by both the property-owner debtor and the escrow holder to pay the plaintiff on funding of a new loan on the property. The court held the escrow holder was estopped to deny liability to the plaintiff because the escrow holder actively participated in inducing the plaintiff to detrimentally rely on the promise of payment. (*Id.* at pp.82-85.)

Universal rather than plaintiffs. (*Kirby*, *supra*, 183 Cal.App.3d at pp. 60-61.) *Kirby* held the defendant escrow holder liable to the plaintiffs on a negligence theory.

Kirby's analysis began with a review of established principles governing an escrow holder's role and duties.[6] *Kirby* recognized an escrow holder is a limited agent of the parties to the escrow, representing these principals only insofar as it carries out the escrow instructions, and that a breach of an escrow holder's duty to use reasonable skill and diligence in implementing the escrow instructions exposes it to liability for any resulting injury suffered by its principals. (*Id.* at pp. 64-65.) However, after citing numerous cases that describe the duties owed by an escrow holder to its principal, *Kirby* relied on *Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co.* (1962) 205 Cal.App.2d 68 (*Builders' Control Service*) to hold that an escrow holder owes the same obligations to nonparties to the escrow. The *Kirby* court noted that the escrow holder had constructive knowledge of the assignment of the Pierces' note from one nonparty (Universal) to another nonparty (the plaintiffs), and then stated:

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[6] In the earlier portion of its opinion, *Kirby* recognized the Pierces were entitled to pay Universal, even though Universal had assigned the Pierces' promissory note to the plaintiffs, because an obligor is entitled to pay the original obligee until the obligor receives notification of the assignment, and merely recording the assignment does not suffice as notification that required payment be made to the assignee. (*Kirby*, *supra*, 183 Cal.App.3d at pp. 62-63.) That aspect of *Kirby* is consistent with current law (see §2937, subds. (d), (f)), and validates the bankruptcy court's ruling that the payment to Talbert exonerated Furnish's liability under the note.

> "Receipt of notice of the assignment was equivalent to the receipt of new escrow instructions regarding the party to be paid. [Citing *Builders' Control Service*.] Such 'new' instructions conflicted with the Pierce's verbal instructions to pay Universal. This conflict should have alerted defendant to a potential problem in paying Universal rather than the [plaintiffs], and vice versa. As the escrow holder faced with conflicting instructions, [defendant] had the duty to delay payment of escrow funds until such time as the proper payee was identified. [Citation.]
>
> "Notwithstanding the fact that payment to Universal would have been proper under the provisions of the [Commercial Code], that act represented a violation of defendant's overriding duty as an escrow agent . . . [Defendant] may be held accountable for the loss it occasioned by negligently paying escrow funds to the wrong party." (*Kirby, supra,* 183 Cal.App.3d at pp. 65-66.)

Kirby's holding rested on its reading of *Builders' Control Service* that (1) knowledge of an escrow holder that a nonparty distributee of funds from the escrow has made an assignment of the right to receive those funds is deemed an amendment to the escrow instructions by the parties to the escrow, and (2) an escrow holder who follows the parties' instructions rather than the "deemed amended" instructions is exposed to liability even though its principals suffer no injury from the fact the escrow holder followed its principals' instructions.

Kirby's holding is flawed because *Builders' Control Service* does not stand for either legal proposition. In *Builders' Control Service,* a lender agreed to fund the owner-builder's construction of homes and deposited the

loan proceeds with the plaintiff, a fund control agent; plaintiff was to use those funds to pay the construction costs. The parties also agreed that the owner-builder would assign the proceeds from the sale of the newly constructed homes to the plaintiff fund control agent as an additional source to pay the construction costs. The defendant acted as escrow holder for the proceeds of the home sales knowing the owner builder had assigned the sales proceeds to the plaintiff fund control agent. (*Builders' Control Service, supra,* 205 Cal.App.2d at pp. 70-71.) The issue in *Builders' Control Service* was whether the escrow holder, knowing its principal had assigned the sales proceeds held by it, was obligated to disburse those proceeds to the owner's assignee, the fund control agent.

Although the *Builders' Control Service* court concluded the escrow holder was obligated to disburse the funds to the owner-builder's assignee, the principles it applied have no application to whether an escrow holder owes duties to a nonparty based on an assignment made by a stranger to the escrow to a stranger to the escrow. The *Builders' Control Service* court first noted that when a home sale escrow closed, the escrow holder held the sales proceeds as agent for the owner-builder principal. The *Builders' Control Service* court then cited section 2344 for the rule that, when a principal has assigned funds to a third party, an agent for that principal who comes into possession of those funds must surrender them to the third party. (*Id.* at p. 73.) Thus, *Builders' Control Service* stands for the proposition only that an agent's obligation to disburse proceeds held by the agent for its principal is

coextensive with the principal's obligation to disburse those proceeds to the assignee.[7]

In our view, *Kirby* misread *Builders' Control Service*. *Builders' Control Service* holds only that an agent's knowledge of an assignment by its principal obligates the agent to honor the principal's assignment;[8] *Kirby* transformed that obligation, which is founded in the law of agency, into a duty owed to honor contracts made by creditors of the principal even though the escrow holder had no agency relationship with the creditor. Moreover, the agent's obligation to the third party under *Builders' Control Service* is coextensive with the principal's obligation to the third party; *Kirby* transmuted the agent's obligation into one that is independent of the principal's obligation

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[7] The core holding of *Builders' Control Service* is confirmed by an understanding of the purpose and scope of the duties created by section 2344. As explained by the court in *Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 482-483, the obligation owed by an agent under section 2344 as to funds held by the agent for its principal is limited to what the claimant would otherwise be entitled to recover from the agent's principal; the "purpose of section 2344 . . . is to avoid circuitry of action rather than to enlarge the scope of the recovery to which the claimant is entitled against the principal."

[8] *Kirby's* citation to *Builders' Control Service* as holding that receipt of notice of the assignment was equivalent to the receipt of new escrow instructions regarding the party to be paid demonstrates *Kirby's* misreading of *Builders' Control Service*. In the context of *Builders' Control Service*, the agent's receipt of notice of the assignment could be deemed the equivalent of a new instruction regarding the party to be paid because the assignment was made by the owner-builder, a party to the escrow entitled to give instructions to the escrow holder. However, *Kirby* transmuted that agency concept into a holding that transactions by strangers to an escrow can supersede and amend the instructions given by the parties to the escrow. Nothing in *Builders' Control Service* supports that remarkable conclusion.

because it held the agent liable on the note even though the principal was exonerated from further liability on the note by the payment to Universal.

An escrow holder is an agent of the parties to the escrow and is responsible for following the escrow instructions of its principals. *Kirby* is the only case of which we are aware that holds an escrow holder who follows its principal's instructions, and whose action caused no injury to the principals, can nevertheless be liable to strangers to the escrow for negligence. Because *Kirby's* holding was based on a misconstruction of existing law, we are convinced it was erroneously decided and should not be perpetuated. We therefore conclude that the trial court's judgment, to the extent it rests on *Kirby,* was erroneous and must be reversed.

C. An Escrow Holder Owes No General Duty of Care to a Nonparty Stranger to the Escrow

Summit alternatively argues the judgment was proper because all persons are liable for injuries caused by their negligent conduct. (§ 1714, subd. (a).) However, whether a duty of care exists is the foundational legal issue, and "[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57-58 [declining to find duty].) In *Biakanja v. Irving* (1958) 49 Cal.2d 647, the court stated at page 650 that: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the

forseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." It is the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions. (*Axley v. Transamerica Title Ins. Co., supra,* 88 Cal.App.3d at p. 9.) Application of the *Biakanja* factors convince us we should not depart from this general rule.

First, the transaction CLTC undertook was not intended to affect or benefit Summit. CLTC was engaged by Dundrel and Furnish to assist them in closing a loan transaction between Dundrel and Furnish, and any impact that transaction may have had on Summit was collateral to the primary purpose of the escrow. Second, although the certainty of injury element is satisfied because the evidence supports the conclusion Summit did not receive the funds paid to Talbert, the forseeability of harm element does not support a duty because there is no suggestion CLTC could have foreseen that Talbert would default on its obligation to disburse the funds to Summit as Talbert had agreed to do under the assignment.[9]

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[9] In arguing for imposition of a duty, Summit emphasizes that CLTC knew Summit was the assignee of the note and deed of trust and knew or should have foreseen that payment to Talbert would injure Summit. However, foreseeability of financial injury to third persons is not alone sufficient to impose liability for negligent conduct. (*Quelimane Co. v. Stewart Title Guaranty Co., supra,* 19 Cal.4th 26, 57-58.)

The next two factors also militate against imposing a duty on CLTC. We do not assign moral blame to the act of paying Talbert rather than Summit where that act fulfilled CLTC's duty as an escrow holder to perform the instructions given to it by the parties to the escrow (*Vournas v. Fidelity Nat. Tit. Ins. Co., supra,* 73 Cal.App.4th at p. 674), and was an act authorized by statute (§ 2937, subds. (d), (f)). Furthermore, there is not a sufficiently close connection between the payment of Talbert and the injury suffered by Summit to warrant imposition of a duty of care. Although the payment to Talbert extinguished Furnish's obligation under the note, Summit's injury was caused by its own noncompliance with its statutory obligations (§ 2937, subd. (d)) and because Talbert breached its contractual obligation to Summit.

Finally, we decline to impose the duty advocated by Summit for reasons analogous to those articulated in *Sanchez v. Lindsey Morden Claims Service, Inc.* (1999) 72 Cal.App.4th 249. In *Sanchez,* an independent insurance adjuster was hired by the insurer to assist it in discharging the insurer's obligation to pay its insured for a loss covered by the policy. The insured sued the claims adjuster, alleging the adjuster negligently handled the claim and caused economic injury to the insured. The *Sanchez* court, applying the *Biakanja v. Irving* factors as refined by *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, explained at pages 253-255 the reasons it would not impose on the adjuster a duty of care to the insured. The *Sanchez* court noted the adjuster is subject to the control of its principals, and it is the principal that ultimately decides whether to pay the insured, and thus any injury to the insured is primarily attributable to the principal's actions. Moreover, the insurer may by contract limit its exposure to the

insured but an adjuster does not have that contractual ability; imposing a duty to the insured could create the anomaly that the adjuster is exposed to greater liability than the principal. *Sanchez* also noted that an adjuster owes a duty of loyalty to its principal; imposing a duty toward the insured would be poor policy because the conflicting obligations would interfere with the adjuster's faithful performance of its duty toward the principal. (Accord, *Gay v. Broder* (1980) 109 Cal.App.3d 66, 74-75.) Finally, the goal of deterring negligent conduct would not be significantly advanced by imposing a duty because adjusters are already deterred by the fact that the principal who hired them can seek indemnity from the adjuster for negligent conduct.

The *Sanchez* court buttressed its conclusion not to impose on the adjuster a duty of care to the insured with the observation that:

> "Our conclusion is also consistent with the general law of agency. An adjuster is an agent hired by a principal, the insurer, to investigate a claim. Agents are not liable to third parties for economic loss: 'An agent's mere failure to perform a duty owed to his principal may render him liable to third persons who rely on his undertaking where there is physical damage to person or property. [Citation.] But where the effect is merely to cause economic loss, the law does not yet recognize liability to a third person, except where a duty is created by statute.' [Citation.]" (*Sanchez v. Lindsey Morden Claims Services, Inc., supra,* 72 Cal.App.4th at p. 255, italics omitted.)

Similar considerations support our conclusion in this case. First, an escrow holder is subject to the control of its

principals, and it is the principal that issues the instructions to be followed by the escrow holder. Second, imposing a duty here would have the anomalous effect that the original debtor is exonerated from liability on his debt by his agent's payment to Talbert but the agent making that payment for its principal becomes liable on that debt. Third, imposing a duty would be poor policy because it would subject the escrow holder to conflicting obligations and interfere with its primary duty to follow its principal's instructions. Finally, the goal of deterring negligent conduct would not be significantly advanced by imposing a duty because escrow holders are already deterred by the fact that the principal who hired them can seek indemnity from the escrow holder to the extent the principal was injured by the escrow holder's negligence.

C. Conclusion

We hold that CLTC did not owe a duty of care to Summit under *Biakanja v. Irving, supra,* 49 Cal.2d 647. We also conclude *Kirby* was incorrectly decided and should not be followed. Accordingly, there is no basis for permitting Summit to recovery from CLTC.

DISPOSITION

The judgment is reversed. Appellant shall recover costs on appeal. CERTIFIED FOR PUBLICATION

/s/ McDonald
McDONALD, J.

WE CONCUR:

/s/ Nares
NARES, Acting P.J.

/s/ O'Rourke, J.
O'ROURKE, J.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 242 S. Orange Ave, Suite 202 Brea, CA 92821.

On the date ascribed below, I served the foregoing document described as:

PETITION FOR REVIEW

on the interested parties who have appeared in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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(X) I deposited such envelope in the mail at Brea, California. The envelope was mailed with postage thereon fully prepaid.

( ) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postage service on same day with postage thereon fully prepaid at Brea, California, in the ordinary course of business. I am aware that on motion of the party served,

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( ) I delivered such envelope by hand-delivery to the offices of the addressee (s).

(X) I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 4, 2001, at Brea, California.

/s/ Robert M. Grandon
Declarant

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